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No. 10-521

In The
# Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY,

*Petitioner,*

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH
and UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF FOR COLORADO COUNTIES, INC., THE COLORADO MUNICIPAL LEAGUE, AND THE NATIONAL LEAGUE OF CITIES, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Colorado Counties, Inc. ("CCI") is a non-profit corporation founded by Colorado's county commissioners in 1907 to further county government cooperation and efficiency. Using discussion and cooperative action, CCI works to solve the many financial, legal, administrative and legislative problems confronting county governments throughout Colorado. As the voice for county governments in Colorado collectively, CCI is interested in protecting the fundamental power and authority of local government to plan for and regulate the use of land within their respective jurisdictions.

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 264 of the 270 municipalities located throughout the State of Colorado, including all 96 home rule municipalities, 167 of the 173 statutory municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its

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[1] The parties were notified at least ten days prior to the due date of the intention to file. All parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *Amici* state that no counsel or any party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel contributed materially to the preparation or submission of this brief.

mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

Accordingly, the Tenth Circuit's determination that Boulder County cannot regulate land uses through the mechanism of legitimate and neutral zoning laws, where the proposed landowner is a religious institution, is of paramount importance to all of the Colorado's counties and municipalities, along with CCI and CML as non-profit organizations involved with those local governments. Local government authority over land use decisions is the expressed policy of the state of Colorado and deference to local government decisionmaking in this arena has long been recognized by the U.S. Supreme Court. Furthermore, the Tenth Circuit's holding poses the potential of far-reaching impacts to those municipalities nationwide represented by NLC.

## SUMMARY OF THE ARGUMENT

This case involves the tension between state and local government sovereignty and the power of the federal government to enforce individual rights. The Tenth Circuit's application of the Equal Terms and Unreasonable Limitations provision contained in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc(b)(1) and (b)(3)(B),

("RLUIPA"), upsets that tension, ignores precedent and violates Section 5 of the Fourteenth Amendment to the U.S. Constitution and the Establishment Clause, U.S. Const. amend. 1. Due to the persistent disarray in the federal circuits over the meaning and application of RLUIPA's provisions, local governments remain perplexed over whether and how they may accommodate competing land uses involving religious institutions.

In promulgating RLUIPA, Congress ignored considerable federal and state court precedent requiring deference to local government decisionmaking in regulating land uses. Numerous federal and state courts recognize the fundamental power and authority of local government to plan for and regulate the use of land within their respective jurisdictions. This is also the expressed policy of the State of Colorado.[2] Pursuant to such pronouncements, local governments must be vigilant and assure that all types of development are undertaken in harmony with the way local communities function, while also assuring the

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[2] Colorado enacted its first land use statutes in 1929, three years after the Supreme Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This law provided Colorado's statutory cities and towns with authority over land use planning. Currently, four different enactments of the Colorado General Assembly provide local governments with authority in the area of land use determinations: The County Planning Act, §§ 30-28-101 to 404 C.R.S.; The Local Government Land Use Controlling Act of 1974, §§ 29-20-101 to 108 C.R.S.; The Areas and Activities of State Interest Act, §§ 24-65.1-101 to 502 C.R.S., and The Municipal Planning and Zoning Act, §§ 31-23-101 to 314 C.R.S.

protection of their citizens from adverse effects of unregulated land uses. Both the federal courts and the States recognize that local governments are in the best position to exercise that vigilance and make such decisions.

It is the responsibility of local governments, representing their citizens, to decide whether or where a proposed land use can occur. The Tenth Circuit's decision in this case may instead be interpreted to allow any religious land use to occur, without regard to local citizens' interests or desires, even though such use conflicts with local governments' application of neutral and generally applicable zoning regulations. The Court in the instant case construed the provisions of RLUIPA to usurp local government legislative authority and placed itself in the position of determining whether a land use can occur in Boulder County. This approach was taken despite proof from Boulder County that religion and the First Amendment free exercise protections played no role in the decision to deny the church's development request. The Court's application of RLUIPA essentially eliminated all local control over establishing compatible land uses where the subject landowner is a religious institution.

If the Tenth Circuit's decision is upheld, counties and municipalities throughout Colorado and in other states, may be thwarted when an attempt is made to protect the utility, value and future of the land as a matter of public interest through land use regulation. This may require Colorado's local governments

to allow land uses the State of Colorado deems detrimental under state law. Further, many local governments simply lack the substantial resources necessary to defend a challenge brought in federal court respecting such matters. *See* Heather M. Welch, *The Religious Land Use and Institutionalized Persons Act and Mega-Churches: Demonstrating the Limits of Religious Land Use Exemptions in Federal Legislation*, 39 U. Balt. L. Rev. 255, 293-294 (2010). Under the Tenth Circuit's interpretation of RLUIPA's scope, local governments must acquiesce to practically every proposed religious land use or face costly federal litigation respecting all such decisions. *See City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.")[3]

These concerns prompt *Amici* to urge this Court to grant certiorari in this case to provide much needed guidance and to resolve the uncertainty local governments now face as such entities attempt to plan and organize land use for all of their citizens.

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[3] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

## ARGUMENT

### I. THE DECISION BELOW IGNORES THE CONSTITUTIONAL RULE THAT THE FEDERAL GOVERNMENT SHOULD DEFER TO LOCAL GOVERNMENTS IN LAND USE DECISIONS AND CREATES UNCERTAINTY FOR LOCAL GOVERNMENTS MAKING LAND USE DECISIONS

The longstanding deference to local governments land use decisionmaking is ignored by the decision below. The Tenth Circuit's application of RLUIPA's Equal Terms, 42 U.S.C. § 2000cc(b)(1), and Unreasonable Limitations, 42 U.S.C. § 2000cc(b)(3)(B), provisions instead establish an apparent immunity for religious landowners respecting the application of neutral zoning laws. The resulting preference for religious uses violates Section 5 of the Fourteenth Amendment to the U.S. Constitution and the Establishment Clause. Moreover, the decision does not provide any meaningful guidance to local governments struggling to comply with both their own governing laws and the dictates of RLUIPA. In fact, given its substantial divergence from the approach taken in decisions from other circuits, the opinion below leaves local governments in a quandary as to how to comply with the terms of RLUIPA.

### A. FEDERAL COURTS HISTORICALLY FOLLOW THE CONSTITUTIONAL RULE THAT THE FEDERAL GOVERNMENT SHOULD DEFER TO LOCAL GOVERNMENTS IN LAND USE DECISIONS

Congress' powers under Section 5 of the U.S. Constitution extend only to "enforcing" the provisions of the Fourteenth Amendment, not to determining what constitutes a constitutional violation. *Boerne*, 521 U.S. at 519. When Congress enacts legislation "against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed." *Id.* at 536 (Holding that the provisions of RFRA exceeded congressional authority).

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court established that a municipality may invoke its police powers, under the Constitution, and restrict the use of property in order to promote the public health, welfare and safety. A long line of cases decided after Euclid continued to uphold the constitutional rule that the federal government should defer to local governments in land use decisions. *See, e.g., Solid Waste Agency v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("Regulation of land use [is] a function traditionally performed by local governments.") (citation omitted); *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of

land use is perhaps the quintessential state activity.") (citation omitted); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is traditionally a function performed by local governments."); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities."); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928) (reviewing zoning restrictions under low level scrutiny).

Federal courts, including the Tenth Circuit, historically held that land use decisions are matters of local concern and that principles of federalism strongly limit federal involvement in this area. "Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." *Deane v. United States*, 329 Fed. Appx. 809, 814 (10th Cir. 2009) (citation omitted); *see also Nichols v. Bd. of County Comm'rs*, 506 F.3d 962, 971 (10th Cir. 2007) ("Federal courts should be reluctant to interfere in zoning disputes which are local concerns.") (citations omitted); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 125 (3d Cir. 2002) ("[I]n the federal Constitutional universe, federal courts accord substantial deference to local government in setting land use policy, and that only where a local government's distinction between similarly situated uses is not rationally related to a legitimate state goal, or where the goal itself is not legitimate,

will a federal court upset a local government's land use policy determination."); *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 487 (10th Cir. 1998) ("A local government has broad power to implement its land use policies by way of zoning classifications.") (citation omitted); *Evans v. Board of County Comm'rs*, 994 F.2d 755, 761 (10th Cir. 1993) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.") (citation omitted). Congress ignored this long standing federal deference to local government control of land use when promulgating RLUIPA. *See*, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 335-41 (2002). (Discussing congressional hearings on The Religious Liberty Protection Act Bills ("RLPA")).

The Tenth Circuit's decision in this case further ignores the constitutional doctrine of deference to local government decisionmaking in this area and applies RLUIPA in a manner that creates an improper accommodation for religious land uses. The interpretation of the Equal Terms and Unreasonable Limitations provisions by the Tenth Circuit expands the application of RLUIPAy by creating an apparent exemption from the local special use approval process for religious uses. A test that is "too friendly to religious land uses may unduly [limit] municipal regulation and maybe even [violate] the First Amendment's prohibition against establishment of religion by

discriminating in favor of religious land uses." *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 370 (7th Cir. 2010), *citing Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

In the instant case, the Tenth Circuit states that a local government violates RLUIPA's Equal Terms provision if it treats a religious applicant less favorably in processing, determining, and deciding a special use application than it treats a similarly situated nonreligious assembly or institution. *Rocky Mt. Christian Church v. Bd. of County Comm'rs*, 605 F.3d 1081, 1087 (10th Cir. 2010). Under this standard, it does not appear to matter what reason, rational or compelling, the government provides as a basis for any differential treatment. Instead, any treatment of a religious institution that can be portrayed as "less favorable" when applying a neutral, generally applicable law is deemed a violation.

The court states the Unreasonable Limitations provision is violated where land use regulations, as applied or implemented, have the effect of depriving religious institutions of reasonable opportunities to practice their religion, including the use of structures. *Id.* at 1089. This standard leaves local governments perplexed. Determining what constitutes a reasonable opportunity is apparently left to the involved parties. This approach creates a high probability that a religious institution will challenge any government's unfavorable ruling as a deprivation of the reasonable opportunity to practice its religion whatever rationale

fuels the government decision. Such an overbroad approach cannot be proportional or congruent to any legitimate end to be achieved by RLUIPA. *See City of Boerne v. Flores*, 521 U.S. 507, 519-520 (1997).

Land use decisionmaking is, by its nature, an ever evolving process. As soon as a use is established, the community changes and the next proposed use must be considered in light of both the pre-existing uses and the planned uses. As new uses are established, future uses are eliminated or created. Application of a neutral law does not result in the same decision every time. By eliminating any examination of a rational basis for these decisions, the Tenth Circuit's decision eviscerates the local governments' ability to meet the needs and desires of all citizens in a balanced manner. The broad standards stated by the Tenth Circuit further negate the ability of local governments to consider the impact of a proposed use by a religious institution from any practical standpoint, as a federal court challenge alleging less favorable or unreasonable treatment seems a given. Further, a government may conclude that approving a use once compels approval of that use for all religious institutions in perpetuity. As was the case with RFRA, "[t]his is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Boerne*, 521 U.S. at 534.

### B. A SPLIT IN THE CIRCUITS OVER THE EQUAL TERMS AND UNREASONABLE LIMITATIONS PROVISIONS CREATES UNCERTAINTY FOR LOCAL GOVERNMENT LAND USE PLANNING

The Equal Terms and Unreasonable Limitations analysis set forth by the Tenth Circuit in this case further complicates the already divided judicial interpretations of RLUIPA.

The Equal Terms provision was interpreted several different ways by various circuits. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007) ("a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the *regulatory purpose*" (emphasis in original)); *River of Life Kingdom Ministries*, 611 F.3d at 382 (7th Cir. 2010) ("a land-use regulation that on its face or in its operative effect or application treats a religious assembly or institution less well than a nonreligious assembly or institution will violate the equal-terms provision even if it was adopted or implemented for reasons unrelated to religious discrimination."); *Konikov v. Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005), *citing Midrash Sepharai, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) ("For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the

other, as in our familiar equal protection jurisprudence. Rather, the relevant 'natural perimeter' for comparison is the category of 'assemblies and institutions' as set forth by RLUIPA. In other words, the question is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions.").

The Unreasonable Limitations standard set forth by the Tenth Circuit, while offering no meaningful guidance to local governments, is also dissimilar to the examination and explication of this provision in the Seventh Circuit. *See Vision Church v. Village of Long Grove*, 468 F.3d 975, 990-991 (7th Cir. 2006) ("The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals. . . . In this case in particular, the special use designation is substantially related to the municipal planning goals of limiting development, traffic and noise, and preserving open space; these goals, in turn, are reflected in the Village's Comprehensive Plan, 'which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development in character with the existing motif of the community.'" (citation omitted)).

The inability of local governments to discern how to comply with RLUIPA that is compelled by the existing circuit court interpretations cannot avoid creating uncertainty in the area of land use planning.

Local governments nationwide rely on a uniform set of legal principles when it comes to making land use decisions. The instability imposed on planners by the ongoing disagreement over the meaning and scope of RLUIPA invalidates these uniform principles when it comes to religious uses. This ambiguity impacts the value of land for all landowners and hampers development for residential and commercial uses. Further, the apparent inability of local governments to regulate religious land uses in any meaningful way unfairly impacts residential homeowners. *See* Marci A. Hamilton, *The Unintended Consequences RLUIPA has Visited on Residential Neighborhoods in* RLUIPA Reader: Religious Land Uses, Zoning and the Courts (M. Giaimo & L. Lucero eds. 2009).

Over eighty years ago, this Court in *Euclid* upheld the police powers of local government to protect the health, safety and welfare of its citizens. Colorado placed the power to determine compatible uses of land in the hands of local governments elected by local citizens. As stated by the Colorado Supreme Court in *Baum v. Denver*, 363 P.2d 688 (Colo. 1961): "This court is not equipped to zone particular parcels of land. We do not see the land, we do not see the community, we do not grapple with its day-to-day problems." *Id.* at 695.

Congress ignored longstanding federal and state jurisprudence, as well as express state interests in managing their land, when it enacted RLUIPA. As evidenced by the Tenth Circuit's conclusion in this case, a local government, acting neutrally in applying

its zoning regulations, can see its decision overturned simply because the permit applicant is a religious landowner. Under the Court's reasoning, as soon as a local government allows a similar land use to that requested by a religious landowner, the government cannot deny the religious landowner's request. This conclusion ignores the ever-evolving nature of land use determinations. As populations grow and communities develop, a once acceptable land use may no longer be in the community's best interest, no matter who the landowner happens to be. In unconstitutionally increasing its power, by taking over inherently local and state power to regulate land use, Congress has ignored the constitutional doctrine of deference in land use established by the court and has revised free exercise rights. RLUIPA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *See Boerne* at 519-520. RLUIPA is a substantial intrusion of the rights of state governments to regulate for the health and welfare of their citizens.

## CONCLUSION

In conclusion, for all of the foregoing reasons, *Amici Curiae* Colorado Counties, Inc., Colorado Municipal League, and the National League of Cities respectfully submit that this Court should grant Boulder County's petition for a writ of certiorari.

Respectfully submitted,

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